

No. 11977

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BARNETT POLLACK,

Appellant,

vs.

PAUL SAMPSELL, Trustee in Bankruptcy of the Estates of
JUDD BRADLEY and OLLIE V. BRADLEY, Bankrupts,

Appellees.

APPELLANT'S OPENING BRIEF.

PETER T. RICE,

521 Chester Williams Building, Los Angeles 13,

Attorney for Appellant.

TOPICAL INDEX

	PAGE
Facts	1
Question of law.....	2
Argument	3
1. Bankruptcy courts are governed by the principles of equity and the law of the state with respect to right of ownership in crops growing on land which is subject to deed of trust.....	4
2. It is inequitable to deprive a trust deed lien holder of his security by the indirect method of bankruptcy when such deprivation is not within the direct power of the debtor	6
Conclusion	8

TABLE OF AUTHORITIES CITED

CASES	PAGE
American Fuel & Power, In re, 151 F. 2d 479.....	5
Bank of America v. Hirsch, 64 Cal. App. 2d 184.....	5
Cook v. Huntley, 44 Cal. App. 2d 640.....	5
Eyster v. Goff, 91 U. S. 521, 23 L. Ed. 403.....	8
First National Bank v. Livestock National Bank, 31 F. 2d 416	4, 5
First Trust Co. v. Baylor, 1 F. 2d 24.....	4
Gibson v. Warden, 14 Wall. (U. S.) 244, 20 L. Ed. 797.....	7
Hyde Park etc. v. West Norwood, 127 F. 2d 654.....	5
Isaacs v. Howes, 51 S. Ct. 270, 282 U. S. 734.....	6
List v. Sandel, 42 Cal. App. 2d 507.....	5
Penryn Co. v. Sherman Worrell Co., 142 Cal. 643.....	5
Silveira v. Ohm, 189 P. 2d 782.....	5

TEXTBOOKS

17 American Bankruptcy Reports (N. S.) 273.....	6
---	---

No. 11977

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BARNETT POLLACK,

Appellant,

vs.

PAUL SAMPSELL, Trustee in Bankruptcy of the Estates of
JUDD BRADLEY and OLLIE V. BRADLEY, Bankrupts,
Appellees.

APPELLANT'S OPENING BRIEF.

Facts.

This case involves the following question of fact. Appellant was the holder of two First Deeds of Trust upon a ranch owned by the bankrupt. He gave notice of default and time and place of foreclosure sale prior to debtor's insolvency proceeding. Thereafter, such insolvency proceedings were commenced and a restraining order issued which prevented appellant from holding his foreclosure sale upon the date regularly set, to wit: October 31, 1947. Because of such continued restraint, the foreclosure sale was postponed from time to time over objections of Trust Deed holder.

While such restraint was in force, on November 15, 1947, the Trustee harvested a crop of oranges from the

trees growing on the property covered by the Deeds of Trust; the money realized from the sale of such oranges was placed in the general funds of this estate. Following such harvest and sale of crop, appellant was permitted to proceed with his foreclosure sale, which resulted in a deficiency in excess of the amount for which the crop of oranges had been sold. By order of the Referee and of the District Court, appellant was denied the amount which had been secured from the sale of the oranges, and the same was placed in the general assets of the estate for unsecured creditors.

Question of Law.

The sole question of law involved in this appeal is whether the referee in bankruptcy may enjoin a preferred creditor from proceeding with his foreclosure sale, and during the period of such restraint remove portions of the realty, sell the same, and place the proceeds in the general funds of the estate, so as to deprive the preferred creditor of the benefit thereof.

ARGUMENT.

At the outset, it should be noted that had appellant here been permitted to proceed with his regularly noticed foreclosure sale on October 31, 1947, the unripe unharvested oranges, being unquestionably a part of the realty, would have passed with the realty upon sale thereof; and that, to the extent of their value, such sale would have brought an increased amount to be applied to the secured obligation. When the Referee issued the restraining order which prevented the sale, he, in effect, by continuing the restraining order until such time as the crop could be harvested, took from the secured creditor a portion of his security and gave the benefit thereof to another group of creditors, to wit: the unsecured general creditors. The question here involved is whether the Referee may, by restraining order, in effect, prefer one group of creditors over another.

A thorough search of authorities reveals to appellant no case in which this precise point has been before this or any other court, although it would seem the situation could arise upon many occasions. We are, therefore, forced to draw an analogy from cases in which situations did arise which, by implication at least, bear upon the matter now before this court.

1. **Bankruptcy Courts Are Governed by the Principles of Equity and the Law of the State With Respect to Right of Ownership in Crops Growing on Land Which Is Subject to Deed of Trust.**

Bankruptcy courts are governed by the principles of equity. The whole purpose of the Bankruptcy Act is to protect against preferences and frauds and not to defraud one who, in good faith, had advanced or loaned money or security to one who was insolvent at the time. (Note: In our case, it is admitted that there was no element of insolvency at the time the Deeds of Trust were executed, and even if there were, that element would be immaterial in view of same being purchase money Deeds of Trust.

First National Bank v. Livestock National Bank,
31 F. 2d 416.

The matter is well settled that the Referee may, in the exercise of his jurisdiction, issue restraints even as against secured creditors, for the purpose of determining whether there exists any equity in the bankrupt. But it should, however, be noted that jurisdiction exists to restrain mortgagees (secured creditors) only for a reasonable time, and such restraints do not operate to deprive mortgagee (secured creditor) of their security. In the instant case, it is appellant's contention that the interpretation of the order of the Referee is erroneous in that such interpretations:

- (1) Deprives the mortgagee of his security, and
- (2) It is inequitable.

First Trust Co. v. Baylor, 1 F. 2d 24.

The respondent in the court below makes no claim that if foreclosure sale had taken place prior to harvesting of crops that the unharvested crops would not have gone with the land. Respondent concedes that such unharvested crops would have gone with the land on foreclosure sale.

The laws of the State of California would govern the bankruptcy court in respect to the rights and liabilities affecting the orange crop and the land under the deeds of trust.

Bankruptcy courts are governed by the law of the state wherein the lien is created.

First Nat. Bank v. Livestock Nat. Bank, 31 F. 2d 416;

Hyde Park etc. v. West Norwood, 127 F. 2d 654;

In re American Fuel & Power, 151 F. 2d 479.

Unsevered growing crops are a part of the realty in California.

Penryn Co. v. Sherman Worrell Co., 142 Cal. 643;

List v. Sandel, 42 Cal. App. 2d 507;

Cook v. Huntley, 44 Cal. App. 2d 640;

Bank of America v. Hirsch, 64 Cal. App. 2d 184;

Silveira v. Ohm, 189 P. 2d 782.

The title to crops growing on land subject to a Deed of Trust relates back to the date of the giving of the Deed of Trust.

Cook v. Huntley, *supra*;

Bank of America v. Hirsch, *supra*.

2. It Is Inequitable to Deprive a Trust Deed Lien Holder of His Security by the Indirect Method of Bankruptcy When Such Deprivation Is Not Within the Direct Power of the Debtor.

We shall not attempt to argue that PRIOR to foreclosure a mortgagor (debtor) is not entitled to the rents, issues and profits of the realty; nor that, as a consequence of this rule, if the mortgagor (debtor) removes a crop from the land prior to sale by the mortgagee (secured creditor) that such sale, or the proceeds therefrom, would not belong to the Trustee in Bankruptcy. We do, however, contend that where a sale is regularly scheduled by the mortgagee (secured creditor) which sale, in the ordinary course of events, would take place prior to the harvesting of the crop, but is prevented by order of court until such time as the crops are harvested, that this is a withholding from the mortgagee (secured creditor) of a portion of his security. This position is further supported by the fact that the courts have repeatedly held that if the value of the security is less than the delinquency, a Trustee should not interfere in the foreclosure thereof.

Issacs v. Howes, 51 S. Ct. 270, 282 U. S. 734;

17 *Am. Bankruptcy Reports* (New Series) 273.

In a note in 75 L. Ed. on the above case, page 668, we find the following statement:

“Where the mortgagee is, under his agreement with the mortgagor, entitled to the possession of a mortgaged crop, he is entitled to such possession, as against the Trustee.”

In the instant case, regardless of whether the Trust Deeds themselves contained a right to take possession or not, it unquestionably gave to the holder of the Trust Deeds the right to have the property sold on the date which he set, in this case, October 31, 1947. We contend that upon that date the holder of the Trust Deed became entitled to the possession of the property, or in the alternative, to hold his sale, and he, therefore, became entitled to such possession, as against the Trustee. Being entitled to such possession, the trust deed holder was entitled to the incidents and appurtenances of the realty. In this case, the unharvested crops of oranges is such an appurtenance. It, therefore, follows that when the Trustee sold the oranges, the Trust Deed holder became entitled to their value and was entitled to follow the fund into the hands of the Trustee.

Gibson v. Warden, 14 Wall. (U. S.) 244, 20 L. Ed. 797.

Appellant believes that if the action of the lower court is upheld, it would, as a practical matter, permit a bankruptcy court, in cases where crops may be harvested, to issue an injunction against the secured creditors' foreclosure for an indefinite period of time. The end purpose of such an order could allow successive crops to be harvested and sold until such time as sufficient funds have been realized to pay off all the unsecured creditors in full, thereby, in effect, making a secured creditor pay unsecured creditors.

If the action of the Referee in bankruptcy is upheld, it means that by filing a petition in bankruptcy, the debtor has placed a secured creditor in a worse position than that which he held prior to the bankruptcy, a situation not con-

templated by the Bankruptcy Act and not sanctioned by the courts.

In *Eyster v. Goff*, 91 U. S. 521, 23 L. Ed. 403, the court stated that the creditor of a bankrupt or the man who contests the right to real or personal property with him loses none of those rights by the bankruptcy of his adversary. The bankrupt is not permitted to enlarge his estate at the expense of the secured creditor. If bankruptcy could be used as a scythe to cut away the security of the trust deed holder, then would not this allow the bankrupt to do indirectly what he could not have done directly?

Conclusion.

In conclusion, while a restraint may be placed upon a secured creditor, preventing him from foreclosing his security, we state that such restraint does not operate to place such creditor in a worse position than he occupied before and that if any of the security be removed or harvested after the date when such creditor is regularly entitled to his foreclosure, such crop or harvest must equitably follow the realty and must be set aside as a fund for the benefit of such secured creditor.

We, therefore, respectfully urge this court to reverse the judgment of the lower court, with instructions that all of the proceeds resulting from sale of the orange crop, less costs of harvesting the same, be declared to be a portion of the security belonging to Barnett Pollack; that such fund be delivered to him by the Trustee in bankruptcy.

Respectfully submitted,

PETER T. RICE,

Attorney for Appellant.